Eldeco, Inc. *and* International Brotherhood of Electrical Workers, Locals 776 and 342, AFL–CIO. Cases 11–CA–16006, 11–CA–16140, and 11–CA–16181

October 18, 2001

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On July 29, 1996, the National Labor Relations Board issued a Decision and Order,[1] ordering the Respondent, Eldeco, Inc., to, inter alia, make whole certain discriminatees for any loss of earnings and other benefits resulting from the failure to hire them in violation of the National Labor Relations Act. On December 29, 1997, the United States Court of Appeals for the Fourth Circuit enforced the Board's Order in relevant part.[2]

A controversy having arisen over the amount of backpay due discriminatees, on April 30, 2001, the Regional Director for Region 11 issued a compliance specification and notice of hearing alleging the amount due under the Board's Order, and notifying the Respondent that it should file a timely answer complying with the Board's Rules and Regulations.

On May 14, 2001, the Respondent filed an answer, admitting certain allegations in the compliance specification, and denying others through a general denial. By letter dated May 16, 2001, counsel for the General Counsel advised the Respondent that parts of its answer were insufficient based on Section 102.56 of the Board's Rules and Regulations. On May 30, 2001, the Respondent filed an amended answer, admitting certain allegations, denying others with more specificity, but still addressing other allegations with a general denial. The Respondent also asserted certain affirmative defenses.

On June 26, 2001, the General Counsel filed with the Board a Motion For Partial Summary Judgment, with exhibits attached. On June 27, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause, requiring that "cause be shown, in writing, filed with the Board in Washington, D.C., on or before July 11, 2001 . . . why the General Counsel's motion should not be granted."

On July 13, 2001, a Memorandum in Opposition to Motion for Partial Summary Judgment was filed by the Respondent with the Board, asserting that its amended answer constituted a sufficient answer under Section 102.56. Moreover, the Respondent maintained that "in the spirit of compromise" it was providing even more detailed information as to the backpay to which each discriminatee may be entitled. The Respondent argues that especially in light of the additional information provided in its memorandum in opposition, the Motion for Summary Judgment should be denied.

The General Counsel, Charging Party International Brotherhood of Electrical Workers, Local 776, AFL–CIO, and Charging Party International Brotherhood of Electrical Workers, Local 342, AFL–CIO each filed motions to reject the Respondent's memorandum. The Respondent filed responses to each of the motions to reject.

Ruling on the Motion for Partial Summary Judgment

In his Motion for Partial Summary Judgment, the General Counsel contends that the Respondent's May 14, 2001 answer and its amended answer filed May 30, 2001, are insufficient because they offer only a general denial to paragraph 25, which provided the basic backpay formula, and to paragraphs 26, 29, 30(a), 31(a), 32(a), 33(a), 34(a), 35(a), 36(a), 37(a), 38(a), 39(a), 40(a), 41(a), 42(a), 43(a), 44(a), 45(a), 46(a), 47(a), 48(a), 49(a), 50(a), 51(a), 52(a), and 53 of the compliance specification. The General Counsel submits that these paragraphs should be deemed admitted as true in light of the Respondent's failure to file a sufficient answer within the meaning of Section 102.56(c).[3]

[1] 321 NLRB 857.

[2] 132 F.3d 1007.

[3] Sec. 102.56 (b) and (c) of the Board's Rules and Regulations states:

> (b) Contents of answer to specification.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically set forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) Effect of failure to answer or to plead specifically and in detail to backpay allegations.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed admitted to be true, and may be so found by the Board without the taking of evidence supporting

The matters at issue concern the various factors entering into the computation of gross backpay, which are within the Respondent's knowledge. As to these matters, the rules require more than a general denial. The Respondent must specifically state the basis for disagreement, setting forth in detail its position as to the applicable premises and furnishing the appropriate supporting figures.[4]

The Respondent's amended answer does not constitute a sufficient answer to the gross backpay allegations of the compliance specification under Section 102.56(b) and (c) of the Board's Rules and Regulations. However, the Respondent's Memorandum in Opposition to Motion for Partial Summary Judgment sets forth with specificity the Respondent's disagreement with the proposed backpay formula, and furnishes alternative figures. If this document is accepted by the Board as a timely response to the Notice to Show Cause, it would constitute a second amended answer sufficient to defeat the General Counsel's Motion for Partial Summary Judgment.[5]

There is no dispute that the Respondent's memorandum in opposition was not timely filed with the Board in Washington, D.C., on or before July 11, 2001, as required by the Notice to Show Cause. Rather, the Respondent's memorandum in opposition was filed with the Board on July 13, 2001. However, in the letter accompanying the memorandum in opposition, counsel for the Respondent stated that "[t]his brief was inadvertently filed with the Regional Director in Winston Salem via Federal Express on July 10, 2001, due to a miscommunication between that office and my paralegal."

In his motion to reject the Respondent's Memorandum in Opposition to the Motion for Partial Summary Judgment, counsel for the General Counsel contends that the Board should reject the Respondent's memorandum in opposition because of the Respondent's admitted failure to adhere to the Board's Order requiring that "cause be shown, in writing, filed with the Board in Washington, D.C., on or before July 11, 2001, . . . why the General Counsel's Motion should not be granted." Counsel for the General Counsel notes that the Board's Order is unequivocal as to both when and where the Respondent was required to properly file any response to the Notice to Show Cause. Counsel for the General Counsel also states that he is "completely unaware of any claimed 'miscommunication' with a non-attorney in Respondent's Counsel's office."

Charging Parties Local 776 and Local 342 each additionally argue that the memorandum in opposition should be rejected because it was not served on them. In reply, the Respondent apologizes for the oversight, stating that it was due to an inadvertent and honest mistake.[6]

The Respondent alleges that the reason that its response to the Notice to Show Cause was misfiled with the Region is because of a miscommunication between the Region and a paralegal in the Respondent's counsel's office. The Board generally does not accept late-filed answers, but has made an exception where the answer was timely filed but with an incorrect office of the Agency.[7] In addition, although counsel for the General Counsel denies any knowledge of a miscommunication between the Region and any individual in the office of the Respondent's counsel, the pleadings must be read in the light most favorable to the nonmoving party. Therefore, in the circumstances here, where the Respondent timely filed a response to the Notice to Show Cause but filed it with the wrong office of this Agency, arguably because of a miscommunication between counsel for the General Counsel and counsel for the Respondent, we will accept the response to the Notice to Show Cause.[8]

Having accepted the response to the Notice to Show Cause as a second amended answer, and having found that it is sufficiently specific under the Board's Rules, we deny the General Counsel's Motion for Partial Summary Judgment, and remand this case to the Regional Director for a hearing.

such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

[4] See *Best Roofing Co.*, 304 NLRB 727 (1991).

[5] It is well established that, in a compliance proceeding, a "respondent may cure defects in its answer before a hearing either by an amended answer or by a response to a Notice to Show Cause." *United States Service Industries*, 325 NLRB 485 fn. 2 (1998).

[6] "The Board generally will not reject an improperly served document absent a showing of prejudice to a party." *Paolicelli*, 335 NLRB 881, 882 (2001). Here, neither Charging Party has demonstrated any prejudice. Accordingly, we find that the Respondent's service error does not warrant rejecting its response to the notice to show cause.

[7] *Central Apex Reproductions*, 330 NLRB 1163 (2000). In that case, the Board granted the respondent's motion for reconsideration in order to consider a response to the Notice to Show Cause that had been filed within the appropriate time frame, but with the Division of Judges rather than with the Board in Washington, D.C., as required.

[8] Accordingly, the motions of the General Counsel and the Charging Parties to reject the response are denied.

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 11 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning the issues raised in the compliance specification. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the relevant evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.